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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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JAN 11 1996

In the Matter of

Tariff Filing Requirements for  
Nondominant Common Carriers

CC Docket No. 93-36

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OPPOSITION TO PETITION  
OF BELL ATLANTIC  
FOR PARTIAL RECONSIDERATION

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TELECOMMUNICATIONS  
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January 8, 1996

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## SUMMARY

Bell Atlantic's Petition for Partial Reconsideration should be dismissed because it seeks reconsideration of Commission decisions made nine years ago in another proceeding, not reconsideration of issues decided in this docket. Similarly, Bell Atlantic's challenge to the longstanding classification of carriers as dominant or nondominant raises issues not decided here, but created in another proceeding many years ago. Even if such belated attempts to obtain reconsideration of established Commission rules and policies were permissible -- which of course, they are not -- Bell Atlantic's criticism of the Commission's rationale for adopting the rule at issue is flawed because it ignores essential aspects of the Commission's explanation of the basis for the rule.

Bell Atlantic attempts to equate the tariff filing requirement of Section 203 of the Communications Act with the contract filing provisions of Section 211. On this basis, it concludes that the rule at issue, excusing nondominant carriers from filing their intercarrier contracts with the Commission, is impermissible for the same reasons that the Commission can not excuse carriers from filing tariffs. Bell Atlantic's analysis is incorrect, because the tariffing obligation under Section 203 can not be compared to the contract filing provisions of Section 211.

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The Telecommunications Resellers Association ("TRA"), through its undersigned counsel, and pursuant to Sections 1.4(b)(2) and 1.429(f) of the Commission's Rules, 47 C.F.R. §§ 1.4(b)(1), 1.429(f), hereby submits its Opposition to the Petition of the Bell Atlantic Telephone Companies ("Bell Atlantic"), for Partial Reconsideration ("Petition") of the Order in this proceeding released September 27, 1995, FCC 95-399 (the "Order"). Bell Atlantic asserts that the Commission has unlawfully exempted nondominant carriers from filing intercarrier contracts with the Commission as required by Section 211(a) of the Communications Act of 1934 (the "Act"), 47 U.S.C. § 211(a), "[f]or the same reason that the Commission's forbearance decisions failed to withstand judicial scrutiny." Petition at 1. For the reasons set forth below, the Commission should deny Bell Atlantic's Petition.

I.

INTRODUCTION

The series of Commission decisions that ultimately led to the filing of Bell Atlantic's Petition stretches back more than 15 years, beginning with the Notice of Inquiry and Proposed Rulemaking in Policy and Rules Concerning Rates for Competitive Common Carrier Services,

CC Docket No. 79-252, 77 F.C.C.2d 308 (1989) (the "Competitive Carrier Services proceeding"), in which the Commission created the distinction between dominant and nondominant carriers and classified all carriers as either dominant or nondominant.<sup>1/</sup> In that proceeding and others, the Commission determined that under certain circumstances it would be appropriate to "forbear" from traditional regulation of nondominant carriers.<sup>2/</sup>

Consistent with the different regulatory approaches the Commission initially adopted for dominant and nondominant carriers in the Competitive Carrier Services proceeding, the Commission announced in 1986 that nondominant carriers subject to forbearance from regulation (but not those subject to streamlined regulation) would generally not be required to file intercarrier contracts as required by Section 211(a), and it promulgated a rule implementing the relaxed requirement.<sup>3/</sup> The rule then adopted and now challenged by Bell Atlantic is codified at 47 C.F.R. § 43.51(a).

As authority for the rule, the Commission relied principally on Section 211(b) of the Act, which stated at the time:

The Commission shall also have the authority to require the filing of any other contracts of any carrier [in addition to intercarrier contracts subject to Section 211(a)], and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Reporting Order at ¶ 8 (quoting 47 U.S.C. § 211(b)).

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<sup>1/</sup> Competitive Carrier Services, First Report and Order, 85 F.C.C.2d 1, 10 (1980).

<sup>2/</sup> See Amendment of Sections 43.51, 43.52, 43.53, and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, 1 F.C.C. Rcd. 933 (1986) ("Reporting Order") at ¶ 3 & n. 10.

<sup>3/</sup> Reporting Order, *supra*, note 2, at ¶¶ 3, 11 & n. 23.

The only actions taken by the Commission in this proceeding with respect to the disputed rule were the deletion in the Nondominant Filing Order,<sup>4/</sup> of a former reference in the rule to the Commission's forbearance policy<sup>5/</sup> and the restatement in the Order of the current rule as modified in the Nondominant Filing Order, the sole purpose of which was to correct prior typographical errors in earlier publications of the rule that incorrectly stated the revised rule.<sup>6/</sup> Apparently on this tenuous basis alone -- though it fails to admit this point -- Bell Atlantic seeks reconsideration of the Order.

## II.

### ARGUMENT

#### A. **Bell Atlantic Is Inappropriately Attempting to Seek Reconsideration of the Commission's *Reporting Order*; Not an Order in this Docket.**

Significantly, Bell Atlantic makes virtually no effort to demonstrate that the substance of the regulation it challenges in the Petition was considered in the Order or elsewhere in this docket in a manner justifying reconsideration of the Order. The reason: The rule Bell Atlantic claims is unlawful was not promulgated in this proceeding, but was originally announced *nine years ago* in another proceeding.<sup>7/</sup> Bell Atlantic's glossing over of this fact can not justify reconsideration of the Order on the basis of a matter not evaluated and decided in this docket.

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<sup>4/</sup> Tariff Filing Requirements for Nondominant Common Carriers, 8 F.C.C. Rcd. 6752 (1993) at 6753, note 7.

<sup>5/</sup> See Order at ¶ 18 & n.51.

<sup>6/</sup> Order at ¶ 18 & nn. 52-54.

<sup>7/</sup> See *supra* note 2.

Bell Atlantic should be seeking reconsideration of the Reporting Order,<sup>8/</sup> but instead it has presumably couched its Petition as requesting reconsideration of the Order because it is nine years too late to seek reconsideration of the Reporting Order. Section 1.429(d) of the Commission's Rules, 47 C.F.R. § 1.429(d), requires petitions for reconsideration to be filed within 30 days of the public notice of the final Commission action of which reconsideration is sought. Under even a liberal interpretation of this requirement, Bell Atlantic is woefully tardy in seeking reconsideration of a rule announced nine years ago.

Because it is seeking reconsideration of a rule not promulgated in this docket<sup>9/</sup> but announced years ago in another proceeding, Bell Atlantic's Petition should be dismissed.

**B. Bell Atlantic's Criticism of the Rule at Issue Ignores  
Essential Aspects of the Commission's Rationale for the Rule.**

Even assuming that Bell Atlantic's Petition appropriately addresses issues considered in this docket (which it does not, as explained above), its criticism of the rule at issue is flawed and can not support reconsideration because it fails to address the complete explanation given by the Commission for promulgating the rule.

In its Petition, Bell Atlantic refers only to the Commission's statements in the Reporting Order that Section 211(b) of the Act confers the discretion to waive the intercarrier contract filing requirement of Section 211(a) for "minor" contracts, and that this provision permits the Commission to excuse certain nondominant carriers from the general intercarrier contract filing obligation. Such contracts, the Commission determined, were "minor" within

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<sup>8/</sup> *Supra*, note 2.

<sup>9/</sup> At most, the deletion in the Nondominant Filing Order of the former reference to forbearance in the rule, *see supra*, notes 4-6, was a minor revision to, not promulgation of, the rule.

the meaning of Section 211(b) in that they were "'not useful to us in the performance of our monitoring duties.'" Petition at 3, 5.<sup>10/</sup>

In promulgating the rule, the Commission directly addressed an argument virtually identical to that raised here by Bell Atlantic. It concluded that the provision in Section 211(b) permitting it to exempt carriers from filing "such minor contracts as the Commission may determine" logically referred to contracts that Section 211(a) would generally require to be filed, not, as Bell Atlantic argues,<sup>11/</sup> to contracts referred to in Section 211(b), *i.e.*, carrier contracts *other than* intercarrier contracts. Section 211(b) did not *require* filing of contracts other than intercarrier carrier contracts, as did Section 211(a), but only permitted the Commission to require such contracts to be filed. Since Section 211(b) contained no filing mandate, there was no reason specifically to exempt contracts subject to that subsection from filing; the Commission simply would not require them to be filed. Thus, the Commission concluded, the Section 211(b) authority to exempt carriers from filing minor contracts must have been intended to refer to intercarrier contracts that were required to be filed by Section 211(a).<sup>12/</sup>

Bell Atlantic disputes this reasoning, but fails to acknowledge that in reaching its conclusions, the Commission referred to and relied on sections of the legislative history of Section 211 which it determined support its action.<sup>13/</sup> While challenging the Commission's

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<sup>10/</sup> Quoting Reporting Order at ¶ 11.

<sup>11/</sup> Petition at 4.

<sup>12/</sup> Reporting Order at ¶ 9.

<sup>13/</sup> Reporting Order, *supra*, note 2, 1 F.C.C. Rcd. at 933, ¶ 10 & n.21; *accord*, Amendment of Sections 43.51, 43.52, 43.53, and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, Notice of Proposed Rulemaking, 102 F.C.C.2d 531 (1985) ("Reporting NPRM") at note 2 & accompanying text.

reasoning, Bell Atlantic fails to demonstrate why the stated authority for that reasoning found in the legislative history of the Act does not support the Commission's view. Instead, it merely proffers an alternative interpretation of Section 211.

**C. Tariff Filing Obligations and Contract Filing Obligations Can Not Be Equated.**

Bell Atlantic attempts -- without citation to controlling authority -- to equate the mandatory tariff filing requirement of Section 203, which has been upheld by the courts, with the contract filing requirements of Section 211. Petition at 2-3. On this basis, it concludes that under judicial precedent holding that the Commission has only limited authority to modify the tariff filing requirements of Section 203(a), Section 211 must not give the Commission the authority to exempt certain nondominant carriers from filing intercarrier contracts under Section 211. *Id.*

Bell Atlantic is wrong on four counts. First, the courts have recognized that the tariff filing requirements of Section 203 of the Act are central to the purposes of the Act, and therefore may not be cavalierly modified.<sup>14/</sup> Not so for the contract filing requirements of Section 211(a). Therefore, the two sections and the obligations they impose can not be equated.

Second, judicial interpretations of Section 203 do not provide a logical basis for interpreting Section 211, since the requirements, exemption, and authority granted in each section

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<sup>14/</sup> MCI Telecommunications v. American Tel. & Tel., 114 S. Ct. 2223 (1994) at 2231. Interestingly, the Court speculated that the language of Section 203(c) of the Act, which prevents carriers from providing service without having filed the rates for the service "unless provided by or under the authority of this chapter," "could . . . easily be read as referring to § . . . 211's authorization of services between carriers pursuant to contractual rates . . . and other express statutory exemptions from filing requirements." *Id.* at 2232, n. 5. Although not controlling, the Supreme Court's view that Section 203(c) might contemplate exemptions from filing intercarrier contracts under Section 211 is noteworthy.

are unique to that section. Bell Atlantic cites no relevant authority for extending judicial interpretations of Section 203 to Section 211.

Third, Bell Atlantic's argument assumes the correctness of its reading of Section 211, rather than that of the Commission. A reviewing court could not conclude that the Commission lacks the authority to modify the filing requirements of Section 211(a) without reading Section 211(a) and (b) in a manner consistent with Bell Atlantic. If a court interpreted the Section as the Commission did in the Reporting Order, it could not conclude that the Commission lacks the authority to exempt certain carriers from filing minor contracts otherwise subject to Section 211(a), notwithstanding judicial interpretations of the authority to modify tariff filing requirements conferred on the Commission by Section 203(a).

Finally, there is precedent for the Commission's excusing carriers from filing inter-carrier contracts that would seem to be subject to Section 211(a). In MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988), the Court of Appeals upheld in *dictum* the Commission's explanation for failing to require the filing of Shared Network Facilities Agreements between AT&T and the Bell Operating Companies. Although the reasons approved by the Court for the Commission's not requiring filing of the contracts were not that the contracts were "minor" under Section 211(b), the Court observed that the Commission's refusal to require the filings was "not inconsistent with [the Commission's] earlier decisions." 842 F.2d at 1301-02. Thus, any sweeping statements by Bell Atlantic that the Commission may never permit exceptions to Section 211(a)'s filing requirement are incorrect.

**D. Bell Atlantic's Veiled Challenge to the Commission's Distinction Between Dominant and Nondominant Carriers Is Not Appropriately Raised Here.**

Bell Atlantic argues that, even if Section 211(b) confers the authority for Commission-ordered exemption of minor contracts from Section 211(a)'s filing requirements, the Commission's determination that all intercarrier contracts of certain nondominant carriers should be classified as "minor" within the exemption is incorrect. Petition at 4. Essentially, Bell Atlantic questions the entire basis for the Commission's classification of carriers as either dominant or nondominant and the regulatory consequences that such classifications have by virtue of the circumstances justifying the classifications in the first place.

This subtext of Bell Atlantic's position is made apparent when it argues that "much has happened in the intervening nine years" since the Reporting Order was released that would invalidate the determination that all intercarrier contracts of certain nondominant carriers were "minor" and could be exempted from mandatory filing. Petition at 5. In support of its point, Bell Atlantic discusses the level of competition now faced by AT&T and the aggregate dollar value of services provided by Competitive Access Providers ("CAPs"), calling the prospect that these carriers' intercarrier contracts could be considered minor "inconceivable." *Id.* at 5-6.

Bell Atlantic misinterprets the Commission's approach to defining the contracts that may be "minor" and subject to possible exemption from filing. In the Reporting Order,<sup>15/</sup> the Commission made it clear that it was not evaluating contracts on an individual contract basis, e.g., on the basis of a contract's dollar value,<sup>16/</sup> but instead was considering the significance of

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<sup>15/</sup> 1 F.C.C. Rcd. at ¶ 10.

<sup>16/</sup> Bell Atlantic suggested that dollar value may be an appropriate criterion on which to determine whether a contract was minor. See Petition at 4.

classes of similar contracts "to the regulatory scheme." The Commission explained that it would extend the filing exemption only to contracts that were "'not useful to us in the performance of our monitoring duties,'" i.e., contracts of nondominant carriers subject to forbearance, since their lack of market power justified relying on competitive forces, rather than regulatory oversight, to police their compliance with legal requirements.<sup>17/</sup>

To the extent that the policy considerations and industry conditions that prompted the Commission to accord different regulatory treatment to nondominant and dominant carriers are still valid -- a subject under partial review in pending and forthcoming Commission proceedings<sup>18/</sup> -- then the Commission's application of the filing exemption for "minor" contracts to a certain class of nondominant carrier contracts, based on the same or similar policy considerations and industry conditions, should continue until the Commission determines that circumstances justify altering this approach. No such determination was made in the Order or in this docket; therefore, Bell Atlantic's request that these issues be revisited in this proceeding is inappropriate and should be dismissed.

Indeed, sound public policy reasons exist today, similar to those which first persuaded the Commission that nondominant carriers subject to forbearance should not be required to file intercarrier contracts, which provide a basis for retaining this rule. In the Reporting

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<sup>17/</sup> Reporting Order at ¶¶ 9-11.

<sup>18/</sup> LEC Price Caps Performance Review, CC Docket 94-1, Second Further Notice of Proposed Rule-making, FCC 95-393 (released September 20, 1995) (considering adoption of relaxed, streamlined, and/or nondominant regulation for price cap local exchange carriers). Similar issues with respect to all interexchange carriers are believed to be slated for consideration in a rulemaking proceeding to be initiated soon. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (released October 23, 1995) at ¶ 2.

Order<sup>19/</sup> and the Reporting NPRM,<sup>20/</sup> the Commission found that competitive conditions facing nondominant carriers subject to forbearance were sufficient to provide an effective substitute for regulatory oversight of such carriers through traditional filing and reporting requirements, including the intercarrier contract filing requirement. Such traditional regulation was unnecessarily burdensome for nondominant carriers, according to the Commission.<sup>21/</sup>

The Commission observed that the same considerations and policies that supported adoption of relaxed regulation of nondominant carriers in the Competitive Carrier Services proceeding provided a basis for the relaxed reporting and filing requirements it proposed.<sup>22/</sup> Central to the Competitive Carrier Services proceeding was the Commission's desire to promote and reflect competition in telecommunications markets by reducing or eliminating burdensome and unnecessary regulation of new market entrants, thereby encouraging competitive entry, and benefitting consumers.<sup>23/</sup>

The objectives pursued in the Competitive Carrier Services proceeding and in the Reporting NPRM -- promotion of competition and elimination of unnecessary regulation -- are as worthwhile today as they were then. Competition has not yet developed in all telecommunications services markets, particularly not the local exchange/exchange access markets, to the point where it can develop and survive without regulatory encouragement. To the extent that competition by nondominant carriers is aided, as the Commission intended, by the exemption

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<sup>19/</sup> *Supra*, note 2, 1 F.C.C. Rcd. 933 at ¶¶ 2-3 & nn. 9, 10.

<sup>20/</sup> *Supra*, note 13, 102 F.C.C.2d 531 at ¶¶ 3-5 & n.1.

<sup>21/</sup> Reporting Order, *supra*, note 2, at ¶¶ 2-3.

<sup>22/</sup> Reporting Order, *supra*, note 2, at ¶ 3 & n.10.

<sup>23/</sup> Competitive Carrier Services, First Report and Order, 85 F.C.C.2d 1 (1980) at 2, 5-6.

of such carriers from the requirement to file intercarrier contracts, the public interest in promoting competition in telecommunications services justifies retention of the exemption.

### III.

#### CONCLUSION

For the foregoing reasons, the Telecommunications Resellers Association respectfully requests that Bell Atlantic's Petition for Partial Reconsideration be dismissed.

Respectfully submitted,

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January 10, 1996

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## CERTIFICATE OF SERVICE

I, Roberta Schrock, hereby certify that on this 10th day of January, 1996, copies of the foregoing document were sent by first class, United States mail, postage prepaid, to the following:

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